

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2523

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P/S

To be argued by
MICHAEL D. ABZUG

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2523

VINCENT RIZZO,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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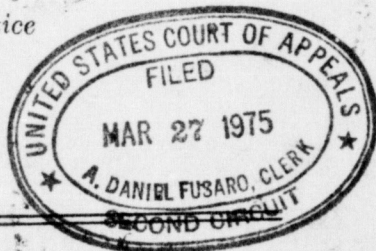




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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent Rizzo appeals from an order entered on October 22, 1974 in the United States District Court for the Southern District of New York by the Honorable Kevin Thomas Duffy, United States District Judge, denying, without a hearing, Rizzo's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence.

Indictment 72 Cr. 1333, filed on December 6, 1972, named as defendants Vincent Rizzo, Philip Crispino and Patty Marino. Count One charged Rizzo and his co-defendants with conspiracy to participate in the use of extortionate means to collect and attempt to collect extensions of credit from John Calamaras and conspiracy to obstruct,

delay and affect the movement of articles and commodities in commerce by obtaining property from John Calamaras by wrongful use of actual and threatened use of force, violence and fear in violation of Title 18, United States Code, Section 894. Count Two charged the defendants with participating in the use of extortionate means to collect and attempt to collect extensions of credit from John Calamaras in violation of Title 18, United States Code, Sections 891(2)(7) and 894. Count Three charged the defendants with obstructing, delaying, and affecting commerce and the movement of articles in commerce by obtaining money from John Calamaras through the inducement of actual and threatened use of force, violence and fear in violation of Title 18, United States Code, Section 1951.

On October 9, 1973, Rizzo withdrew his previously entered plea of not guilty and entered a plea of guilty to Count Three of the indictment before Judge Duffy.*

On December 6, 1973, Rizzo was sentenced by Judge Frederick vanPelt Bryan to a twenty-year prison term on Count Three to run concurrently with previous sentences imposed by Judge Gagliardi on Indictment 73 Cr. 195 **

* On September 12, 1973, before Judge Duffy, Philip Crispino waived indictment and pled guilty to a one-count information (73 Cr. 856) filed on the same date which charged him with conspiring with Patty Marino and Vincent Rizzo, named as co-conspirators but not as defendants, to violate Title 18, United States Code, Sections 894 and 1951.

On November 5, 1973, Crispino received a suspended sentence and was placed on probation for three years. Patty Marino has never been apprehended.

** On June 4, 1973, Judge Gagliardi imposed a 10-year-sentence on Count One, 5-year sentences on Counts Three, Four, Five, Six and Seven to run concurrently with the sentence on Count One, and 4-year sentences on Counts Nine, Ten and Eleven to run concurrently with the sentence on Count One. Rizzo also was fined \$15,000.

and by Judge Carter on Indictment 72 Cr. 1330.* Counts One and Two of Indictment 72 Cr. 1333 were dismissed on appellant's motion at the time of sentence.**

On October 17, 1974, Rizzo moved, pursuant to 28 U.S.C. § 2255, to vacate conviction and sentence. In an order filed on October 22, 1974, Judge Duffy denied the motion without a hearing.***

Statement of Facts

On October 9, 1973 Rizzo, accompanied by his attorney, Gilbert Epstein, Esq., appeared before Judge Duffy. Mr. Epstein informed the District Court that appellant wished to withdraw his previously entered plea of not guilty and wished to plead guilty to Count Three of the Indictment.**** (Tr. 2).

* On June 18, 1973, Judge Carter imposed concurrent 5-year sentences on Counts One and Two. Rizzo also was fined \$5,000.

** Rizzo also had entered pleas of guilty to certain counts of Indictments 72 Cr. 1332 and 73 Cr. 672 which were pending before Judges Bryan and MacMahon, respectively. Rizzo had requested that for sentencing all three cases be referred to one Judge and the three cases were thereafter transferred to Judge Frederick vanPelt Bryan for sentencing. On January 8, 1974 Rizzo received a 5-year suspended sentence on Indictment 72 Cr. 1332 and two concurrent 5-year suspended terms on Indictment 73 Cr. 672.

*** On November 19, 1974 Rizzo filed a notice of appeal from this order. The docket entry for November 19, 1974 reflects that Rizzo filed a notice of appeal from Judge Duffy's order denying a motion for reduction of sentence. In light of Rizzo's moving papers and the docket entry for October 17 and 22, 1974, which characterize the motion as a motion to vacate the sentence pursuant to Title 18, United States Code, Section 2255, the docket entry for November 19, 1974 appears to be erroneous.

**** "Tr." refers to pages of the transcript of the plea proceedings held on October 9, 1973.

After determining that Rizzo was ready to plead, the District Court asked the appellant if he wished to have the third count of the indictment read to him. Mr. Epstein stated that he would waive a reading of the indictment since he had read the third count a number of times and had discussed the indictment and the facts of the case with the appellant. Still unsatisfied, the District Judge specifically asked the appellant if he wished the third count read to him. The appellant responded, "it does not have to be read to me. I don't contest the indictment at all." (Tr. 2).

After appellant entered his plea of guilty to Count Three, Judge Duffy advised Rizzo that before he accepted his plea, the Court had to determine whether it was made voluntarily and with a full understanding of the nature and consequences of his plea (Tr. 2-3). The District Court explored the voluntariness of Rizzo's plea and his understanding of the charge against him as follows:

The Court: Do you know that if you pleaded not guilty you would be entitled to a speedy and public trial by a judge or a judge and jury? Do you understand that, if you pleaded not guilty?

Defendant Rizzo: I would be entitled to a trial, yes, your Honor.

The Court: Do you know that at such trial the government would have to produce its witnesses against you and that you would be entitled through your counsel to cross-examine them?

Defendant Rizzo: Yes, your Honor.

The Court: Do you know that you would have the right to call your own witnesses in your defense?

Defendant Rizzo: I know that, your Honor.

The Court: And that, if necessary, I could issue a process for a summons or a device to get those witnesses to come here. Do you understand that, sir?

Defendant Rizzo: Yes, Your Honor.

The Court: Count 3 of the indictment basically charges that you, Philip Cr[i]spino and Patty Marino did obstruct the movement of articles and commodities in commerce and attempt to do so by extortion, that is, by obtaining money from John Calamaras with his consent but induced by wrongful use of actual or threatened use and force.

Do you understand what the nature of the charge you are pleading to is, sir?

Defendant Rizzo: I understand my role in that, your Honor.

The Court: Mr. Padget, what is the range of penalties which is available here?

Mr. Padget: A maximum of 20 years and I believe a maximum of \$10,000, your Honor.

The Court: Have any threats or promises been made to you to induce you to plead guilty?

Defendant Rizzo: No, your Honor.

The Court: I am about to make you aware of one thing at this point: If I accept the plea of guilty in this case, I understand you have also pleaded guilty before Judge Bryan?

Defendant Rizzo: Yes, Your Honor.

The Court: I intend to refer this matter to Judge Bryan for sentence. I will not keep it for sentence. Do you understand that, sir?

Defendant Rizzo: Yes, your Honor.

The Court: Now, other than that, is there any understanding or prediction that has been made to you concerning what sentence you might receive?

Defendant Rizzo: No, your Honor. (Tr. 3-4).

After satisfying himself that Rizzo was entering the plea voluntarily and with a full understanding of the nature of the charge, Judge Duffy asked Rizzo if he had committed

the offense charged in the indictment. The following exchange ensued:

Defendant Rizzo: The fact is I know what I did and I was aware of it and that's it. I could only tell your Honor exactly what I did, the way I conducted myself, what my intentions were and that's it.

The Court: Tell me what you did.

Defendant Rizzo: Mr. Calamaras, who was my dear friend, I went out of my way to give him as much money and borrow for him as much money as physically possible.

My role in it was the role of getting monies for Mr. Calamaras. Besides my own money, I got him other monies. Interest was paid on monies. The rate of interest, I don't know the law as far as the shylocking is concerned, but interest was paid on this money. It was above the interest of a bank of 8 percent a year or whatever the bank rate is.

The Court: How much was it, do you know?

Defendant Rizzo: Yes, sir. There was one loan that amounted to \$10,000 that Mr. Calamaras paid \$130 a week. He paid it at \$20 a day for five days a week and then on Saturday he would pay \$30 and that amounted to \$130 to be paid back at 100 weeks, which is \$13,000, which would be \$3,000 interest.

Then there was other monies, that I gave him personally. I believe it amounted to approximately \$1500 and he insisted on paying me the rate that he would have had to pay if I would have got the money off of somebody else, which I believe was \$35 a week interest. That loan persisted or continued approximately less than two months. At that time it was a constant thing, going there every day, trying to get some money, but this relationship between me and Mr. Calamaras has been in existence since the Blue Sea restaurant has been opened on Third Ave-

nue and prior to that when he owned a restaurant on Avenue B between 12th and 11th street.

My personal relationship with him was beyond the point of a casual friend.

The Court: The Blue Sea restaurant has been open for about how many years?

Defendant Rizzo: Approximately 1964, your Honor. '64-'65. It was a small more or less a coffee shop before the actual restaurant was opened near or adjacent to the same premises. As far as me extending myself to him, I felt obligated to him because he extended himself to me. How he extended himself to me was by paying with me a car for over a year, giving me as much money as I needed at certain times, a few years back, and I have never—I have always offered to bring my family in there, go in there and eat as the place was as good as mine. He said I could do whatever I want.

Besides being a regular friend, the man was more or less like my father so that was our relationship and we belonged to the same fraternity and I had a certain obligation to our beliefs and that's it.

Now, as far as Mr. Cr[i]spino is concerned, he has never given that man any money. I wouldn't allow it. He collected money on my request and so did Patty Marino.

How they collected the money, I was unaware of it. I was unaware Mr. Cr[i]spino ever threatening this man because I would never allow it and I was also unaware of Mr. Marino threatening this man.

As far as Mr. Marino and Mr. Calamaras, as far as I know it to be, he stressed to him the extreme pressure I was under, being I borrowed this money and I had to pay it back, and things just piled up as far as monies. The day came where I gave out—I borrowed more than I could possibly pay back and I had—being he was so close to me, I had to discuss

this with him every day that he was well. When Mr. Calamaras became sick, I told him that's it. I says, 'You're unable,' and his son took up the obligation, whatever the obligation was, that's about it. The last time I saw Mr. Calamaras was in St. Vincent's Hospital approximately two weeks before he passed away and I discussed this with him.

I says, 'I have an indictment that claims that I forced you.'

He says, 'My son, don't worry about it.'

And I says, 'Well, I asked my lawyer at the time if it would be proper to get a note or something or some kind of a document.'

And he says, 'It isn't necessary. If Mr. Calamaras lives he comes to court. If he doesn't live, you have no case.'

So, I relayed that back to him and he again told me 'Don't worry about it' and that's it.

As far as me saying anything that would be not the truth, even if the man is dead, I haven't got that right.

The Court: But you did send Mr. Cr[i]spino and Mr. Marino to collect for you?

Defendant Rizzo: Yes, Your Honor.

The Court: Do you still wish to plead guilty to count 3 of this indictment?

Defendant Rizzo: Yes, your Honor. (Tr. 5-8).

After Rizzo told the District Court that he had discussed the case with his attorney, Mr. Epstein stated that his discussions with the prosecutor and his review of Government tape recordings had satisfied him that there was no reason for the Court not to accept Rizzo's plea of guilty. (Tr. 8-9).

Judge Duffy concluded the allocation by noting that he believed that Rizzo was "acting voluntarily and knowl-

edgeably and that there was a basis in fact for the guilty plea." (Tr. 9).

On October 17, 1974, Rizzo moved, pursuant to Title 28, United States Code, Section 2255, to vacate his sentence and set aside the judgment of conviction. In support of his motion, Rizzo argued that the District Court had accepted his plea of guilty without making a proper determination, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, that the plea was entered voluntarily and with an understanding of the nature of the charge and consequences of the plea.

In an order dated October 22, 1974, Judge Duffy denied the appellant's motion stating that "upon review of the transcript it is clear that the petitioner's allegation is unfounded."

ARGUMENT

The Motion Under 28 U.S.C. § 2255 Was Properly Denied.

A. The record establishes that Rizzo understood the nature of the charge to which he pleaded guilty.

Rizzo argues that Judge Duffy failed to determine whether he understood the charge to which he pleaded guilty. The claim is without merit.

Although both appellant and his attorney declined the District Court's offer to have the indictment read, Judge Duffy took care to explain to Rizzo that Count Three of the indictment charged him and his co-defendants with obstructing the movement of articles in commerce and attempting to do so by extortion, specifically, by obtaining money from John Calamaras with his consent but induced

by the wrongful use of actual or threatened use of force. (Tr. 2, 3-4). Rizzo unequivocally responded that he understood his role in Count Three as it was described to him by the District Court (Tr. 4). By contrast, in *United States v. Irizarry*, Dkt. No. 74-1866 (2d Cir. December 19, 1974), slip op. 899 at 908, the defendant did not acknowledge that he understood the charge.

Furthermore, the record reflects that both Rizzo and his attorney acknowledged that they had had an opportunity to discuss the indictment and the facts of the case with each other before the appellant entered his plea. Cf. *United States v. Lester*, 247 F.2d 496, 500 (2d Cir. 1957); see, *United States ex rel. Brock v. LaVallee*, 306 F. Supp. 159, 163 (S.D.N.Y. 1969). The record here is more than sufficient to refute the claim that Rizzo did not understand the charge.

B. The record reveals a sufficient factual basis for the plea.

Rizzo contends that the record fails to establish a sufficient factual basis for the District Court to have accepted his guilty plea.* The argument is without merit.

In *United States v. Irizarry*, *supra*, this Court restated the general standard for determining whether there is a factual basis for a guilty plea under Rule 11 as follows:

“[P]articularly where more than one defendant is charged, a sufficient statement of the acts and intent of the particular defendant, what the defendant did and intended is necessary to an intelligent deter-

* Since the appellant did not raise this issue in his § 2255 petition before the trial court, he is foreclosed from raising it on appeal. *United States ex rel. Springel v. Follette*, 435 F.2d 1380, 1384 (2d Cir.), *cert. denied as Springel v. Zelker*, 401 U.S. 980 (1970).

mination of whether there was a factual basis for the plea". Slip op. at 912 n. 9, quoting *United States v. Steele*, 413 F.2d 967, 969 (2d Cir. 1969).

Irizarry also makes clear that the reading of the indictment and obtaining the defendant's admission that he committed the acts charged therein may, in some cases, comport with the test laid down in *Steele*. *Id.* at 912-13 n.9.

The Government submits that the appellant's plea of guilty, when considered in conjunction with his unequivocal admission that he understood his role in Count Three as it was described to him by Judge Duffy,* "sketched out a sufficient factual basis" for acceptance of the plea. *United States v. Irizarry*, *supra*, slip op. at 912.

Furthermore, the appellant's remarks during allocution gave the District Court additional facts from which to conclude that Rizzo's plea had a sufficient factual basis. It is well settled that threats of force against a person other than the victim from whom property is sought to be obtained may constitute extortion under the Hobbs Act.

*The appellant's admission that he understood his role in the charge before he entered his plea of guilty stands in sharp contrast to *United States v. Irizarry*, *supra*, slip. op. at 904; *United States v. Steele*, *supra*, 967-968 fn. 2; *United States v. Laundry*, 463 F.2d 253, 254 (9th Cir. 1972) and *United States v. Majko*, 457 F.2d 790, 791 (7th Cir. 1972). Moreover, in the instant case, appellant's understanding of the charge against him was further demonstrated to the District Court by his statement that he had had an opportunity to discuss it with his attorney and Mr. Epstein's statement that he had "discussed the indictment with Mr. Rizzo and the facts of the case." (Tr. 2, 8) The appellant's discussion of Count Three with his attorney constitutes an additional factual basis for the plea since Rizzo's familiarity with the charge indicate that his guilty plea was a knowledgeable "admission of all the elements of (the) formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1968).

See, *United States v. Stubbs*, 476 F.2d 626, 627 (6th Cir. 1973) and *United States v. DeCarlo*, 458 F.2d 358, 368 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972). Here, Rizzo squarely admitted that he had sent Crispino and Marino to collect money owed by Mr. Calamaras on a usurious loan. Moreover, despite appellant's statement that he was not aware of the methods that Crispino and Marino had used to collect repayments on his usurious loan to Mr. Calamaras, Rizzo admitted that he attempted to induce Mr. Calamaras to repay the loan in daily meetings with him during which he implied that a "dear friend" of Mr. Calamaras would suffer adverse consequences if Mr. Calamaras did not repay the usurious loan. The fact that "the dear friend" who would suffer if Mr. Calamaras did not repay the usurious loan was Rizzo himself does not make the inducement any less extortionate.* Rizzo's admissions thus distinguish the present case from those where the defendant has denied the commission of an essential element of the charge. *United States v. Navedo*, Dkt. No. 74-1623 (2d Cir. March 17, 1975) slip op. 2307 at 2314; *Hulsey v. United States*, 369 F.2d 284, 287 (5th Cir. 1966).

Finally, the tape recordings heard by Rizzo's experienced attorney and his discussions with the prosecutor had convinced defense counsel that there was no defense to the charge, and this could properly be considered by Judge Duffy in deciding whether a sufficient factual basis for the plea existed.

* The extortionate nature of these inducements is further highlighted by Rizzo's admission that he knew his loans to Calamaras were ~~extortionate~~ (Tr. 5).
usurious

CONCLUSION

The order of the District Court denying the motion without a hearing should be affirmed.

Respectfully submitted,

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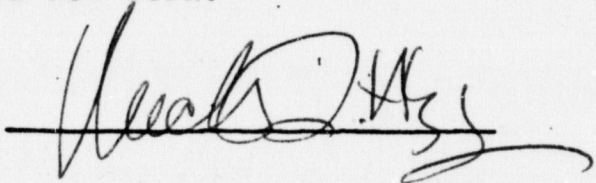
State of New York)
County of New York)

Michael D. Abzug
deposes and says that he is employed in the office of
the Joint Strike Force for the Southern District of New
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That on the 27th day of March
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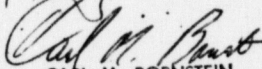
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Sworn to before me this

27th day of March, 1975


CARL M. BORNSTEIN
Notary Public, State of New York
No. 31-0359368
Qualified in New York County
March 30, 1977

